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IN THE
Supreme Court of the United States

October Term, 1968
No. 760

JOSEPH JOHN HESSION

and

SOPHIE HESSION, His Wife,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where, in the construction of an Interstate highway running southwest to northeast, said Interstate highway being near and to the east of the previously and presently existing intersection of a State highway running north and south with a city street running east and west on the northwest corner of which intersection petitioners' place of business is and was located, it became necessary to change the travel pattern of said intersection and the Commonwealth of Pennsylvania did so by closing off that portion of the State highway running from the intersection to the south and relocating that portion of the State highway extending from said intersection one-fourth mile to the north a distance of 300 feet to the east under and beyond said Interstate highway and thence continuing in a southerly direction, but without closing said portion as it then existed or without denying any previously existing rights of ingress and egress to or from petitioners' place of business, and without payment of any compensation to the petitioners for the said change in the travel pattern, did such change of travel pattern constitute a "taking" under the Pennsylvania Eminent Domain Code of 1964 so as to entitle petitioners to compensation therefor and did the refusal of such compensation to petitioners by the Commonwealth of Pennsylvania violate the Fifth and/or Fourteenth Amendments to the Constitution of the United States in that private property of the petitioners was taken for public use without just compensation and/or in that the petitioners were deprived of property without due process of law?

Answered in the negative by the court below.

COUNTER-STATEMENT OF THE CASE

This case is before Your Honorable Court on a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, which reversed an order of the Court of Common Pleas of Philadelphia County finding that the petitioners had sustained compensable injuries and awarding a jury trial to determine the amount of such injuries after the Commonwealth had appealed from the award of the Board of Viewers, which awarded twenty thousand ($20,000) dollars as compensation in an eminent domain action instituted by the petitioners.

The petitioners are the owners of a property situated on the northwest corner of State Road and Longshore Avenue in the City of Philadelphia, Philadelphia County, Pennsylvania. State Road runs in a general north-south direction, and Longshore Avenue runs in a general east-west direction. The petitioners' property consists of a combination tavern, restaurant and residence.

On July 31, 1961, the Commonwealth of Pennsylvania, acting through the Department of Highways, condemned certain properties in the City of Philadelphia for the purpose of constructing Legislative Route 1000, Section E2, a portion of an Interstate highway, more commonly known as the Delaware River Expressway. As a result of the construction of the highway, State Road was vacated in a southerly direction, which vacation commenced immediately south of Longshore Avenue, thus converting the previous four-way intersection into a "T" intersection. In addition, State Road has been relocated and now crosses

Longshore Avenue at a point approximately 300 feet to the east of the intersection described above. That portion of old State Road to the north of Longshore Avenue remains open to traffic, is of the same width and grade as that prior to the construction, and, contrary to the petitioners' allegations, has never been abandoned or vacated and remains a part of the State Highway System. The new Interstate highway passes over Longshore Avenue in an elevated manner, and therefore, traffic and the right of passage upon Longshore remain as they were prior to the construction. Longshore Avenue was and continues to be a two-way street and is of the same width and grade as that prior to the construction.

The petitioners' rights of ingress and egress to and from their property have not been impaired in any way whatever, and their access to the general system of streets and roads remains substantially unchanged. No portion whatever of the petitioners' property was condemned by the Commonwealth.

The petitioners' basic contention, precisely stated, is that the vacation of State Road south of Longshore Avenue and the relocation of the portion to the north of Longshore Avenue constitutes a taking of property from them, for which taking they are entitled to compensation.

The Commonwealth's basic position is that since the petitioners' property did not abut either the improved or vacated areas, since they suffered no diminution whatever in their rights of ingress and egress to and from their property and since there was no change of grade or injury to the surface support of any kind, any injury which the petitioners might have suffered does not constitute the taking of a property right so as to entitle them to compensation.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

The Petition for Writ of Certiorari Should Be Denied Because No Substantial Federal Question Exists and Because Prior Decisions of This Court, on Related Questions, Indicate That This Court Will Leave to State Courts the Determination of Such Issues as Have Been Raised by the Petitioners

The respondent, the Commonwealth of Pennsylvania, respectfully submits that the petitioners have failed to raise any substantial federal question which has not, in effect, been heretofore decided by this Court.

In the construction of an interstate highway, the Commonwealth of Pennsylvania, acting through the Department of Highways, found it necessary to vacate the southerly leg of a four-way intersection on the northwest corner of which the petitioners own and operate a combination tavern, restaurant and residence. The three remaining legs of the intersection including the two legs upon which the petitioners' property abuts remain exactly as they were prior to the time the improvement was effected. No portion whatever of the petitioners' property was taken; but, nevertheless, they contend that they have suffered a compensable injury as a result of the above described vacation. This case when stripped of all embellishments, then, is essentially concerned with a property owner's rights in relation to the existing system of

public streets and highways and the existing traffic patterns thereon. Thus, the petitioners are asking Your Honorable Court to determine the rights of abutting property owners, under Pennsylvania law, in the streets on which they abut.

Determination of questions concerning such property rights have traditionally been left to the state courts. *Sauer v. City of New York,* 206 U.S. 536 (1906); *Marchant v. Pennsylvania Railroad Company,* 153 U.S. 380 (1894); *Meyer v. Richmond,* 172 U.S. 82 (1898).

In *Marchant v. Pennsylvania Railroad Company,* supra, a portion of the street on which the plaintiff's property abutted was condemned by the railroad company for construction of an elevated railroad. The pillars supporting the elevated roadway were imbedded in the foundation of the street; however, they were not in front of the plaintiff's property. As in the instant case, no portion of the plaintiff's land was taken or occupied in any way by the railroad. Upon trial, the Court of Common Pleas instructed the jury that the damages suffered were compensable. The Supreme Court of Pennsylvania reversing, ruled that the damages were noncompensable. This Court indicated that it would not interfere with the state court's determination of state law. It was said at page 385:

> "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that Court in its construction of domestic laws, we should be obliged to hold, as has often been held in like cases that we

have no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason."

In *Sauer v. City of New York*, supra, the city had built a viaduct on 158th Street which had the effect of disturbing the plaintiff's access, light and air. The plaintiff alleged that the statute which authorized the construction of the viaduct was invalid for failure to provide compensation for rights of which the plaintiff claimed to have been deprived. The statute had been upheld by the New York Court of Appeals, and this Court subsequently affirmed that decision. The plaintiff alleged, inter alia, that the decision of the New York Court of Appeals denied him certain rights allegedly secured by the Federal Constitution. This Court said at page 548:

"The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; or it may determine that he has an absolute or unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the

law of the various states to a uniform rule which it shall announce and impose."

It seems clear therefore, and rightly so, that this court will not take upon itself the burden of determining routine questions of property law in the several states. This presumes that no constitutional issues of monumental magnitude are presented. However, as indicated by Rule 19(a), Rules of this Court, review on writs of certiorari should not be granted if the federal question presented is neither one of substance nor one decided contrary to applicable decisions of this Court. It is respectfully submitted that the question raised by the petitioner is not only not a federal question of substance, but was decided below squarely in line with the holdings in *Marchant* and *Sawyer,* supra.

There is a great deal of language in the instant petition to the effect that the petitioners have been deprived of a property right without due process of law, contrary to the express provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. It would appear however, that unless, under the laws of Pennsylvania, the petitioners have acquired such a property right, the taking of such alleged right would not constitute a deprivation of property in violation of the Fifth and Fourteenth Amendments simply because the supposed "property" never existed.

In *Meyer v. Richmond,* 172 U.S. 82 (1898), the City of Richmond had authorized the Richmond and Allegheny Railway Company to construct a portion of its works in such a manner as to obstruct the street upon which the plaintiff's property abutted. The Supreme Court of Appeals of Virginia had denied the plaintiff recovery of any

damages, and this Court affirmed. At page 95 it was said:

> "If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria* he cannot be said to have been deprived of any property." (Citing *Marchant v. Pennsylvania Railroad,* supra.)

This Court in *Meyer* went on to say, also on page 95:

> "The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specifically damaged beyond others, but is such damage or deprivation of property within the meaning of the constitutional provision? . . . Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide."

Immediately following the latter quote, the court proceeded to discuss several previous cases in which it had considered the issue of consequential damages generally. The cases were that of *Northern Transportation Company v. Chicago,* 99 U.S. 635 (1879), *Chicago v. Taylor,* 125 U.S. 161 (1888), and *Gibson v. United States,* 166 U.S. 269 (1897). In the first two cases the injuries for which compensation was sought were the result of consequential damages incurred during construction, but which ceased when the construction was completed. While the respondent well recognizes a difference in quality and degree between damages suffered for a temporary period and damages resulting from a permanent change in the street system surrounding a property owner's land, it should be noted that this Court made it clear in both of these cases that the question of conpensability of such damages was to be determined by the state courts and the disallowa ıce

of such compensation by the state tribunals did not constitute any affront to basic property rights protected by the Federal Constitution. In *Northern Transportation Company v. Chicago,* supra, the court said at page 642:

> ". . . acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action."

In the *Gibson* case, supra, the damage to the claimant's property was permanent, however, and resulted from the construction of a dike by the U. S. Army Corps of Engineers which impaired a riparian property owner's access to the navigable channel of the Ohio River. It would appear that a valid analogy might be drawn between the *Gibson* case and the instant case. Both cases deal primarily with impairment of access to public ways and in neither case was any portion of the claimant's property taken. In holding that the damage suffered by Mrs. Gibson was damnum absque injuria, this Court said at page 275:

> "The 5th Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation'. Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

It would appear, then, that the refusal of the Supreme Court of Pennsylvania to grant compensation for consequential injuries is squarely in accord with those decisions of this court dealing with such injuries.

Nor can the petitioners complain that they have been deprived of "due process of law". It should be noted that the critical factor in determining whether due process has been accorded a complainant is whether a fair trial or hearing, governed by procedures fair, reasonable and adequate under the circumstances are available to the complainant. *Pearson v. Yewdall,* 95 U.S. 294 (1877), *Remington Paper Co. v. Watson,* 173 U.S. 443 (1899). In this case there is no doubt but that such hearings and procedures were not only available but were utilized by the petitioners as they have been before the Board of Viewers, the Court of Common Pleas and the Supreme Court of Pennsylvania. The only matter about which the petitioners can truly complain is that the law of Pennsylvania is unsatisfactory as applied to them.

Also, it should be noted that there is nothing unique about the damages allegedly suffered by petitioners. The statute and decisions of which they complain probably affect all members of the public at one time or another. The comment of this Court in *Marchant,* supra, at page 386 appears applicable to this situation:

> "The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like conditions."

On this question the Court also said the following at pages 385-386:

> "It is sufficient for us in the present case to say that even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law'."

In summary, it is respectfully submitted that no substantial federal question has been raised by petitioners and that the questions raised have been decided in accordance with applicable decisions of Your Honorable Court, and the Petition for Writ of Certiorari should therefore be denied.

II.

The Petition for Writ of Certiorari Should Be Denied Because Under the Law of Pennsylvania, the Petitioners Have Suffered No Deprivation of Access to the General System of Streets and Highways so as To Entitle Them To Compensation

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As set forth in the preceding section of this brief, the Commonwealth of Pennsylvania, in the course of the construction of the Delaware River Expressway, converted the intersection of State Road and Longshore Avenue from a four-way intersection to a "T" intersection and relocated State Road to a position approximately 300 feet to the east of its previous location. The petitioners contend, inter alia, that, as a result of this vacation and relocation, they have suffered a compensable deprivation of their rights of access to the general system of streets and roads.

It is the Commonwealth's position that the petitioners have been deprived of no compensable rights of access whatever and that, at the very most, the petitioners have suffered a mere inconvenience common to all other property owners in the general area.

On page 4 of the Petition for Writ of Certiorari, the petitioners state that the quarter-mile section of old State Road to the north of Longshore Avenue has been abandoned and that through traffic upon old State Road has been completely curtailed. The petitioners cite page 5a of the record as authority for this statement. It should be noted at this point that this reference is to the original

Petition for Appointment of Viewers, and the mere allegation contained therein that this section of old State Road has been abandoned is in no manner supported by any testimony whatever contained in the record. The quarter-mile section of old State Road immediately north of Longshore Avenue is, in fact, open to traffic, is of the same grade, width and dimensions as prior to the construction project, has been neither abandoned nor vacated, and therefore remains a part of the State Highway system. The condition of old State Road is well shown by Photograph No. 2, Appendix C, page 22b of the Petition for Writ of Certiorari.

In addition, even if the Commonwealth should decide, at some time in the future, to abandon this quarter-mile portion of old State Road, it would still remain open to traffic and would be maintained by the City of Philadelphia in accordance with the Act of 1945, June 1, P. L. 1242, Art. II, Section 214, 36 P.S. Section 670-214.

It is respectfully submitted that, under the law of Pennsylvania, the word "access", when used in connection with the rights of an abutting owner, means ingress to and egress from the subject property and does not refer to the manner in which a property owner travels from his property to any other place in the region in which he resides. In *Breinig v. Allegheny County,* 332 Pa. 474, 2 A. 2d 842 (1938), the property owner had obtained a permit to install a driveway, including curbing, but in the course of the construction, the county revoked the permit and restored the curb.' The Supreme Court of Pennsylvania affirmed the granting of an injunction restoring access. In utilizing the word "access", that Court said as follows, at page 480:

"Where the land is taken or purchased for highways, the abutting owner retains as an incident to ownership of the remainder of his land, the right of access or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. It is a property right, protected by the Constitution. The right of access, in addition to the rights of the owner in the fee described above, differs from the right of passage by the public generally."

Breinig, supra, and specifically the above language, was cited with approval in the most recent and perhaps the most pertinent case, *Wolf vs. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966). In that case, the Supreme Court of Pennsylvania said at page 39:

"Such right of access does not entitle the abutting owner to access at *all* points along the highway; it does entitle him to access, by reasonable and convenient means, *to his property from the highway and from his property to the highway. . . .*" (Emphasis supplied.)

In *Wolf,* supra, the Pennsylvania Supreme Court also cited with approval a Missouri case, *State of Missouri v. Meier,* 388 S.W. 2d 855 (Mo. 1965), certiorari denied, 382 U.S. 846 (1965). It was said as follows in *Wolf,* supra, at page 46:

". . ., the Supreme Court of Missouri has well evaluated the prospective rights of an abutting owner and the State: 'an abutting owner's property right to "access" is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further

right to connect with or reach the system of public highways, which right is also subject to reasonable restriction under the police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State.' "

It is clear then that, under the law of Pennsylvania as evidenced by the above cases, an abutting landowner's rights of access to a public street are indeed a property right. However, it is clear also that this right of access is limited to the ability of the landowner to gain access to and from the streets and highways upon which his property abuts and does not include the right to have direct access to all portions of the general system of highways.

Donovan v. Pennsylvania Co., 199 U.S. 279 (1905), cited on page 9 of the Petition for Writ of Certiorari is not at all inconsistent with this definition of access. In that case a property owner (the Pennsylvania Co.) was prevented from reaching the streets upon which its passenger station abutted by the actions of various independent cabbies and hack drivers. In defining an abutting landowner's right of access to a public street as a property right, then, this Court held nothing more than that the right consisted of the right of the landowner to leave his property via the abutting streets, free from interference by the offending cabbies. This is essentially the extent of the right of access accorded abutting property owners in Pennsylvania.

The holdings in the *Creasy* cases cited on pages 9 and 10 of the Petition for Writ of Certiorari appear also to be consistent with the present law in Pennsylvania. (*Martin v. Creasy,* 360 U.S. 219 (1959), *Creasy v. Lawler,* 8 Pa. D. & C. 2d 535 (1956) and *Creasy v. Stevens,* 160 F. Supp. 404 (W.D. Pa. 1958). In those cases the owners of businesses situated along an existing free access highway brought an action in federal court to restrain the Governor and the Secretary of Highways of Pennsylvania from designating that section of road as a "limited access highway". The federal court issued an injunction; and this Court reversed, holding nothing more than that it was improper for the district court to issue the injunction when there appeared to be a complete and adequate remedy under the law of Pennsylvania. All of these cases involved the situation where the abutting property owners were prevented from reaching the street upon which their properties abutted, unlike the situation in the instant case where the petitioners' ability to reach the abutting streets remains unimpaired.

The petitioners cite also *People v. Ricciardi,* 23 Cal. 2d 390, 144 P. 2d 799 (1943). In that case there was indeed "a substantial change in the highway itself" in that, as in the *Creasy* cases, supra, the portions of highway upon which the property owner's land abutted were themselves physically altered in the course of the construction project, thereby substantially impairing the owner's ability to enter and leave his property. In addition, in *Ricciardi,* supra, a portion of the owner's property was taken, unlike the situation in the instant case.

It is clear from the record here that the petitioners' property has sustained no change in the rights of access as defined by the above cases. The petitioners' property

does not directly abut upon any improved area and no change of grade or injury to surface support has occurred on either of the two streets upon which their property does abut.

The petitioners can still exit from their property onto old State Road and turn right, or southwardly, to Longshore Avenue. Upon reaching Longshore, they may proceed in either direction, eastwardly or westwardly, without interruption. It is also possible for the petitioners to exit from their property and turn left, or northwardly onto old State Road and travel in the same direction and upon the same system of public streets as was available prior to the construction.

The only change which the construction has effected in the general area of the subject property is that, at a point commencing on the southerly side of Longshore Avenue, State Road has been vacated in a southerly direction and has been relocated to a position approximately 300 feet to the east. Thus, the petitioners are not denied the right to travel in a southerly direction, since, by traversing Longshore Avenue, in an easterly direction, for several hundred feet, they may reach the relocated State Road and thereon may proceed in a southerly direction without interruption. Briefly stated then, the petitioners' right of travel remains completely unimpaired in three directions, and in the fourth it involves a relatively insignificant detour of 300 feet.

With regard to the slight circuity of travel involved in traveling in a southerly direction from the petitioners' property, the Commonwealth respectfully submits, that under the law of Pennsylvania, this does not entitle a property owner to compensation. This the Superior Court of

Pennsylvania recently decided *In Re: Appropriation of Land of Robert E. Mitchell et ux.*, 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1966). In *Mitchell* that Court, in considering the situation where a property owner was forced, as a result of highway construction, to take a more circuitous route over township roads in order to travel to the nearest town, said at page 294:

> "Every slight inconvenience cannot be compensated in damages. The inconvenience here suffered was the same in kind and no greater in degree than could be claimed by all persons in that vicinity . . . The underlying principle is, damages will not be allowed where the effect of the disturbance to the highway is merely to cause the owner to travel a short distance further in order to reach the system of streets in that direction." (Citing *Spang & Co. v. Commonwealth*, 281 Pa. 414, 418, 126 A. 781 (1924)).

The respondent respectfully submits that the Supreme Court of Pennsylvania correctly decided that, under the law of Pennsylvania the petitioners were not entitled to compensation, and for this reason the Commonwealth of Pennsylvania respectfully requests that the Petition for Writ of Certiorari be denied.

III.

The Petition for Writ of Certiorari Should Be Denied Because, Under the Law of Pennsylvania, the Diversion of Traffic and the Subsequent Injury to a Business Do Not Result in the Taking of a Property Right so as To Entitle An Abutting Property Owner to Compensation

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Inextricably associated with the petitioners' claim that they have been deprived of a compensable right of access, is the claim that they are entitled to compensation for the diminution in the value of their business as a result of the diversion of traffic caused by the improvement project.

It is a well settled principle in this Court that damage to a business is not compensable. *Joslin Co. v. Providence,* 262 U.S. 668 (1923) and *Mitchell v. United States,* 267 U.S. 341 (1925). In noting these very cases in connection with the case of *United States ex rel. T.V.A. v. Powelson,* 319 U.S. 266 (1943), the petitioners argue that in none of these cases was the property owner deprived of *all* compensation for the loss in value to his property simply because one element of damage was expressable in terms of loss of business. It is difficult to see how this reasoning defeats the proposition that the damages to a business are generally noncompensable and specifically so in this instance, especially since virtually all the expert valuation testimony in the record of this case indicates that the injury to petitioners' business as a result of the diversion of traffic is the *only* real injury which the petitioners have incurred. Also, it should be noted that the

only reason all compensation was not denied in the *Joslin, Mitchell* and *Powelson* cases, supra, is that there were additional, legally recognized, compensable elements of damage present in each case.

In addition, the refusal of compensation for business damage suffered as a result of diversion of traffic appears to be the generally prevailing view among the various states. The Supreme Court of California, speaking in *People v. Ricciardi,* supra, said on page 399, immediately preceding that portion of the opinion quoted on page 9 of the Petition for Writ of Certiorari.

> "If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right."

In Pennsylvania, the law appears to be equally well settled that a diminution in the value of a business as the result of a diversion of traffic is a noncompensable element of damage. In the *Wolf* case, supra, the Supreme Court of Pennsylvania quoted at length from the case of *Missouri v. Meier,* at page 47:

> " 'Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property.

The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury.

* * * * * * * *

"Respondent, as an abutting property owner on a public highway, does not now have any and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or small, on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor has she had a property right to have the same amount of traffic pass her property as before or to have it move in the same direction. Respondent's property right of access has never extended further than the right to enter upon the highway or to leave it and have reasonable connection to the public road system. Once upon the highway, the police power of the State controlled and respondent and her invitees were subject to the 'Rules of the Road' as established . . . under the police power of the State . . .'' '' (at page 857)

The leading case in Pennsylvania dealing with diversion of traffic, however, is that of *Johnson's Petition,* 344 Pa. 5, 23 A. 2d 880 (1942), a case remarkably similar to the present one. In that case, the state highway upon

which the property owner's land abutted was relocated in such a manner that the new road passed to the rear of the subject property instead of by the front of the property as it had previously. The old state highway reverted to the township, however, and remained open to public travel. Consequently, the number of the landowner's patrons was materially reduced as a result of the diversion of traffic from the old to the new route. As in the instant case, the expert witness took into account the diminution in the value of the landowner's tavern business as a result of the diversion of traffic and allotted a considerable portion of the damages thereto. Unlike the instant case, however, a portion of the landowner's property was physically taken. The Supreme Court of Pennsylvania said at page 10:

> "It is for the loss in market value, *due to the taking,* that the Commonwealth is responsible. The owner's property rights were not invaded nor was there any legal injury to it by reason of the mere fact that the Commonwealth provided an additional road with the result that the public had the choice of two routes and the travelers might choose the new route in preference to the old one. The state owed no duty to the appellee to see that travel continued to pass by his door. The current of public travel is bound to shift as affected by innumerable conditions. 'Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain these highways': Nelson v. State Highway Board, 110 Vt. 44, 1 A. 2d 689, 693, 118 A.L.R. 915. (Also see note attached, p. 921.)

> "The owner of land abutting on a highway has no property or other vested right in the continuance of a certain amount of traffic over that highway so long as he is not deprived of ingress and egress. Here the diversion of traffic was not due to the taking of appellee's land, but was occasioned by the laying out of a new road which attracted the public. . . . In any event, the consequences here were too far removed from the taking to form the basis of a claim of legal injury. . . ."

(See also *Heil v. Allegheny County,* 330 Pa. 449, 456, 199 A. 341 (1938)).

The respondent respectfully submits that, under the law of Pennsylvania, as set forth above, the petitioners are not entitled to compensation for diminution in the value of their business as the result of the diversion of traffic caused by the above described construction project.

The petitioners cite *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922) and *United States v. General Motors Company,* 303 U.S. 373 (1945), in support of their contention that a "taking" in the constitutional sense is not limited to an actual physical seizure of the property. The *Mahon* case, supra, involved the validity of a Pennsylvania statute which forbade the mining of anthracite coal in such a manner or to cause a subsidence of, among other things, structures used for human habitation. The Supreme Court of Pennsylvania held that, under the facts of the case, the statute was constitutional. This Court reversed, holding that there are situations in which the exercise of the police power goes so far as to amount to a taking under the power of eminent domain, for which compensation must be made.

The *General Motors* case, supra, involved the appropriation for temporary occupancy by the United States, of a portion of a building previously occupied by the General Motors Corporation under a long term lease. This Court held that governmental action short of actual acquisition of title or occupancy could, if its effects were such as to deprive the owner of all or most of his interest in the subject matter, amount to a compensable taking.

Respondent has no quarrel whatever with the holdings of these two cases. The Commonwealth of Pennsylvania fully agrees that an actual physical seizure is not necessary for there to be a "taking" in the constitutional sense. However, the respondent respectfully submits that the "taking" must involve, at the very least, the appropriation of a tangible, legally recognized right. It should be noted that in both the *Mahon* and *General Motors* cases, supra, there was just such an appropriation of an actual, legally defined right. In *Mahon,* the right taken was the right of an owner to mine his coal, a right incident to ownership of the coal itself, i.e., the right of a property owner to dispose of his property if he so chooses. In *General Motors,* the right taken was the specific, legally recognized, leasehold right of occupancy. This Court said in *General Motors,* supra, at page 380:

> "Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to these rights of ownership does not include losses to his business or other consequential damage."

As noted previously, the petitioners have not been deprived of any such tangible, legally recognized right incident to the ownership of their property.

The case of *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950), cited by petitioners in support of their contention that business damages are compensable, appears also to have no meaningful application in the instant case. In that case, the Federal Government raised the level of the creek upon which the property owner's land abutted to such a degree that, while there was no actual flooding of the land, its value was almost completely destroyed in that its subsurface water could no longer drain off into the creek. This Court said at pages 802-803:

> "The damage was caused by the underflowing of the land. The subsurface erosion was substantially as destructive as if the land had been submerged."

Even though there was no actual surface flooding then, there was, in effect, a subsurface flooding, a subsurface invasion of the subject property which destroyed its value. As has been shown in the instant case, there has been no invasion whatever of the petitioners' land either above or below the ground level and the property remains exactly as it was prior to the vacation and relocation project described above.

In connection with their argument, the petitioners also cite *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Both cases held, in effect, that the utilization of airspace above a property by airplanes flying so low, as in taking off or landing, as to substantially interfere with the landowners' use and enjoyment of his property constitutes a compen-

sable taking of a property right. Again, respondent has no quarrel with the holdings of these two cases, however, it is respectfully submitted that they have no application here. There is no doubt but that there are property rights, the taking of which is compensable, and that such rights may be other than the ownership of the land itself. Still, the conclusion is inescapable that petitioners have not lost any of these basic rights, as defined by the law of Pennsylvania, so as to entitle them to compensation.

CONCLUSION

The respondent, the Commonwealth of Pennsylvania, respectfully submits that the petitioners have failed to raise any substantive federal question or any question not previously considered by Your Honorable Court. The respondent further respectfully submits that the decision of the Supreme Court of Pennsylvania, as governed by the law of Pennsylvania, is in accordance with the applicable prior decisions of the Court and is in no manner whatever repugnant to the provisions of the Constitution of the United States.

The respondent therefore respectfully urges that Your Honorable Court deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,
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